No. 2631

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

APOSTLES ON APPEAL
(In two volumes)

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY (a corporation), and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

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BRIEF FOR APPELLANT.

Statement of Facts.

This action is based upon a claim for a constructive total loss under two policies of marine insurance covering the Schr. "Wm. Nottingham". Liability is denied upon two grounds:

(1) That the policies were voided by the unseaworthiness of the insured vessel; and

(2) That a constructive total loss of the insured vessel did not exist under the terms of the policies, because the cost of repairing the damages did not amount to the sum required by the conditions of the policies to give the assured the right to abandon as for a constructive total loss.

The Fireman's Fund Insurance Company, appellant, on April 17, 1911, issued two policies of marine insurance, one for $6000, and the other for $24,000, wherein and whereby it insured The Globe Navigation Company appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham", valued at $45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

Thereafter, on the 2nd day of October, 1911, said schooner departed out of the Columbia River, with a full cargo of lumber, on a voyage for Callao, Peru, her port of destination. Shortly after she set sail, on the first day out, and while standing offshore on the port tack, the master ordered the mate to sound the pumps, and the latter thereupon found 15 inches of water in the vessel. Four hours later, the pumps were again sounded, and the water was found to have increased. The water continued thereafter to increase, until, after two days out, it required one hour of pumping out of every four, to keep the vessel free of water. By that time the "Nottingham" was well offshore, and she was

then put about upon the starboard tack, whereupon she immediately commenced to make water freely. The master thereupon ordered the steam pump started, but something was wrong with the pump so that it could not be used. By that time, the "Nottingham" was half filled with water. Eventually, the steam pump was restored to working order, but before the vessel was freed of water she was struck by a northwest gale, and lay over so far that the steam pump could not be used, and she continued to fill. Early on the 9th, she was in such condition that the master concluded to jettison the cargo, but before it could be done, the deck lashings parted and the deck-load went overboard, carrying with it the main, mizzen and spanker masts. The wreckage was cleared away, and attempts again made to pump the vessel out. Before it was accomplished, however, a second gale sprung up on the 11th, and she again filled in a very short time. On the 13th the crew was taken off by the schooner "David Evans", the "Nottingham" then being out of fresh water, and were carried into the port of Astoria, Oregon, whence the "Nottingham" had started, arriving there on Saturday, the 14th.

On the way in, one of the Columbia River tugs was notified of the approximate position of the "Nottingham", and on the next day, the 15th, the tug "Wallula" brought her into the port of Astoria in her dismasted and water-logged condition.

Thereafter, on Monday, October 16th, the manager of appellee, G. F. Thorndyke, served a written notice of abandonment of appellee's interest in said vessel,

as for a constructive total loss, upon Frank G. Taylor, appellant's agent at Seattle, Washington. The abandonment was immediately declined by appellant.

Subsequently, the vessel was libeled by the salvors for $34,000 salvage, and before she was released from her seizure by the United States Marshal, appellee, by consent, caused said vessel to be towed up the Columbia River to the port of Portland, Oregon, on November 29th, where her cargo was discharged, and she was drydocked, and her damages were surveyed for the purpose of determining whether or not she was a constructive total loss under the policies, by ascertaining the repairs needed to restore her to her former condition, and the cost thereof. Specifications for repairs required were prepared, and thereafter bids for the same, in accordance with said specifications, were called for by appellee. The lowest bidder was William Cornfoot, doing business at Portland Oregon, under the style of Albina Engine & Machine Works, who offered to do the required work and to furnish the materials, for the sum of $20,950. The contract for repairs was not let to Mr. Cornfoot, and the vessel was not repaired at that time.

On January 19, 1912, appellee advised the charterer of the vessel, W. R. Grace & Co., that the voyage was abandoned, and tendered the cargo to the latter. The claims for salvage were settled for $3,000.

Demand was made upon appellant for the payment of a total loss under said policies, on the ground that a constructive total loss existed. Compliance with said

demand was refused, and liability for a total loss was denied by appellant. Thereafter, on May 13, 1912, a libel was filed herein, in which recovery of the sum of $30,000, insured by said policies, was sought upon the ground that a constructive total loss existed under said policies, for which a notice of abandonment had been given. Issue was joined, denial being made of the existence of a constructive total loss. An order of reference was then entered, and proof taken thereunder, and subsequently, on March 10, 1914, an amended libel was filed in which an alleged verbal abandonment as for constructive total loss was set up by appellee, as having been made on October 14th. Issue was again joined by answer, denying said alleged constructive total loss, and particularly said newly alleged verbal abandonment. It was affirmatively alleged that when said vessel started upon said voyage, she was unseaworthy in that she was leaky, and that her pumps were not in working order so that the same could be used to keep her free from the water which entered her hull through said leaky condition, and that by reason thereof, said vessel continued to leak and became waterlogged in fair weather, immediately after starting upon said voyage, and that all of the losses and damages suffered upon said voyage were caused and occasioned by such unseaworthiness (all in accordance with the evidence which had been adduced from the master of said vessel after the filing of the original answer).

The policies were of the usual San Francisco hull time form, but did not cover a partial loss, and only insured against an actual and a constructive total loss. By

a clause upon the face of the policies, it was expressly provided:

> "It is also agreed that the insured shall not have the right to abandon the vessel unless the amount which this Company would be liable to pay under an adjustment, as of partial loss for labor and materials, (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured * * *" (clause 9).

The policies also contained provisions by which could be ascertained, as thus required, the amount which the company (appellant) would be liable to pay under an adjustment, as of partial loss for labor and materials; and the evidence clearly showed that if the cost of repairing the damage to the "Nottingham" should be adjusted as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), the amount which appellant would be liable to pay under such an adjustment, would fall far below half the amount insured by the policies. It was, and is, therefore, appellant's contention that, for the foregoing reasons, a right to abandon as for a constructive total loss did not exist.

The policies had endorsed upon their margins, the following provision:

> "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths (¾) running down clause."

It was the contention of appellee that the aforesaid marginal clause superseded the clauses in the bodies of the policies, and, first, that the right to abandon was to

be determined by the general law and not by the policy conditions (clauses 8 and 9), and, second, that, in any event, by reason of said marginal clauses, salvage and general average charges were to be added, not excluded as provided by clause 9, to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, for the purpose of determining whether a constructive total loss existed.

On the other hand, it was the contention of appellant that the marginal clauses did not override the clauses in the bodies of the policies, because they could be construed consistently together, and that the test of the right to abandon as for a constructive total loss remained as provided by clauses 8 and 9, and the rules of adjustment on the backs of the policies. And even on the theory that the general average and salvage charges were to be added to the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials, still, taking the bid of the Albina Engine and Machine Works as the cost of repairing the damage to the "Nottingham", the total did not equal one-half the amount insured by the policies, and that, therefore, the right to abandon, as for a constructive total loss, did not exist.

Appellee questioned the right to use the Albina Engine and Machine Works' bid as determining the cost of repairs, and insisted upon other bids and figures offered in evidence by it, the total of which, on its theory, was sufficient to make a constructive total loss.

The case came on for argument before the Honorable Jeremiah Neterer, District Judge, on the proof taken

on the reference, and, on April 14, 1915, the court rendered its decision holding appellant liable for a constructive total loss under the policies. A decree was thereafter entered for $30,000, and interest, making a total of $33,419.27, less $8,500, or a decreed amount of $24,919.27. The deduction of $8,500 was made on an agreement of the parties.

This appeal is prosecuted from the decree.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court. They will be considered under the following specifications:

I.

That the District Court erred in not holding that the insured vessel was unseaworthy at the commencement of the voyage, and that the loss was caused, and said policies voided, by such unseaworthiness (Assignments of Errors I to XIX, XLIX).

II.

That the District Court erred in holding that the insured vessel was seaworthy at the commencement of her voyage (Assignments of Errors I to XIX, XLIX).

III.

That the District Court erred in not holding that the right to abandon as for a constructive total loss did not

exist under said policies (Assignments of Errors I to V, XIX to LXXI).

IV.

That the District Court erred in holding that a right to abandon as for a constructive total loss existed under said policies (Assignments of Errors I to V, XIX to LXXI).

V.

That the District Court erred in not holding that a constructive total loss did not exist under the policies (Assignments of Errors I to V, XIX to LXXI).

VI.

That the District Court erred in holding that a constructive total loss existed under said policies (Assignments of Errors I to V, XIX to LXXI).

VII.

That the District Court erred in not holding that, if a constructive total loss existed under said policies, the sum of $3,758.31, general average charges paid by appellant, should be credited upon the total amount covered by said policies, and in not crediting said sum upon the amount decreed to be due under said policies (Assignments of Errors LXXII and LXXIII).

The Argument.

I.

THE INSURED VESSEL WAS UNSEAWORTHY AT THE COMMENCEMENT OF HER VOYAGE, AND THE POLICIES WERE THEREBY VOIDED (Specifications of Error I and II).

THE "NOTTINGHAM" WAS UNSEAWORTHY.

The Fireman's Fund Insurance Company, appellant, on April 17, 1911, issued two policies of marine insurance, one for $6,000 and the other for $24,000, wherein and whereby it insured The Globe Navigation Company, appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham," valued at $45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

The "Nottingham," loaded with a cargo of lumber, and bound for the port of Callao, Peru, sailed from Astoria, Oregon, on the 2nd day of October, 1912. Shortly after she set sail, on the first day, and while standing off shore on the port tack, the master ordered the mate to sound the pumps, and the latter thereupon found 15 inches of water in the vessel (Ap. 261). Four hours afterwards, the pumps were tried again, and a longer time than usual was required to pump the water out (Ap. 261). The vessel continued to make water until, after about two days, it took the crew about one hour out of every four before they could get the vessel free from water (Ap. 261-2, 300-1). As the vessel was well offshore by that time, the master put her about upon the starboard tack, whereupon *she immediately commenced to make water very freely* (Ap. 262, 300-4). The

master then ordered the mate to start the steam pump, but something was wrong with the pump and it could not be used (Ap. 265-268, 306-7). *By this time the "Nottingham" was half filled with water* (Ap. 268). Eventually, the steam pump was restored to working order,—just when is uncertain, but about the 8th (Ap. 269, 309-10), for on that date the wind shifted to the northwest, and came on to blow hard (Ap. 268). At the time the gale from the northwest struck the vessel she had not been freed of the water; if she had been, the accident, in the master's judgment, would not have happened (Ap. 310). As it was, she lay over from the wind so that the steam pump could not be used, and so she continued to fill (Ap. 270). Early on the morning of the 9th, conditions were such that the master concluded to jettison the cargo, but before he was able to accomplish it, the deck lashings parted, and the deckload slipped overboard, carrying with it the main, mizzen, and spanker masts (Ap. 270-272). The wreckage was cleared away, and, the wind moderating, an attempt to pump her out was again made (Ap. 272-3). It was nearly accomplished when, on the 11th, a second gale came out of the southeast, and she filled again in five minutes (Ap. 276-7). On the 13th, the crew was taken off by the Schr. "David Evans", the "Nottingham" being at the time out of fresh water (Ap. 280-3).

Presumption of Unseaworthiness.

Up to the gale of the 8th, the weather was the usual weather to be reasonably anticipated (Ap. 300-1). In fact, the master testified that he had passed through as severe weather as the southeast gale hundreds of

times (Ap. 306). In such weather, *the "Nottingham" sprang a leak so badly that pumping with the hand pumps one hour out of every four could not free her of water, and, when she was put on the starboard tack, still in ordinary weather, the hand pumps could not keep her free at all.* Then it was that the steam pump was tried and would not work. Under these admitted facts, *we submit that a presumption of unseaworthiness arises.*

The Southwark, 191 U. S. 1; 48 L. ed. 65;
The Aggi, 93 Fed. 491; 107 Fed. 300;
Pacific Coast S. S. Co. v. Bancroft & Whitney, 94 Fed. 180, 196;
Carolina Cement Co. v. Anderson, 186 Fed. 145;
Steamship Wellesley Co. v. Hooper & Co., 185 Fed. 733 (C. C. A. 9th Circuit);
Benner Line v. Pendleton, 217 Fed. 497.

The steam pump was out of order when the "Nottingham" commenced her voyage, for it did not work when first tried on October 6th, four days after the vessel left port. Nothing had happened in the time elapsing between the commencement of the voyage and October 6th to injure the pump. In the absence of some causes occurring in the interim to which the failure of the pump to work could be attributed, *the presumption conclusively arises that the pump was in the same unsound condition at the commencement of the voyage as when tried on the 6th.*

Benner Line v. Pendleton, supra.

The master stated that the steam pump was used at Astoria for washing down the vessel before she

sailed (Ap. 307-8), but it conclusively appeared that the suction to the bilges was not then used or even tested (Ap. 308-313). The first time the steam pump was used on the bilges was when it was needed to keep the vessel from water-logging (Ap. 309). The last time prior to this voyage when the steam pump had been used on the bilges, was while the "Nottingham" was at Callao, Peru, the second voyage before. In the meantime, she had been from Callao to Astoria, and from Astoria to Australia, and back (Ap. 315) and the steam pump had not been tested, so far as the bilge suction was concerned during all of that time (Ap. 315).

It was stated that Captain Crowe surveyed and passed the vessel before she left port on this voyage, but it appears that Captain Crowe did not see her after she was loaded (Ap. 308). She was looked over by a Mr. Cherry, Lloyd's agent (Ap. 308), but Mr. Cherry was not an agent in any respect of the Fireman's Fund Insurance Company (Ap. 494).

It appears that the "Nottingham" took the mud on her way from Westport to Astoria (Ap. 260), but there is no evidence of any damage done which would account for the leakage (Ap. 317-9, 355-6). On the contrary, it is established by the testimony of C. M. Nelson, a Portland shipbuilder, who was employed by the Port of Portland to examine the "Nottingham" while she was on the St. John drydock, that she sustained no damage from the stranding (Ap. 443-4, 441). Nor did the stranding have any possible connection with the defective condition of the steam pump.

Without any evidence whatsoever by which the leaking and the condition of the ship's most important pump, can be attributed to any cause which arose subsequent to the commencement of the voyage, we submit that the "Nottingham" falls fairly and squarely within the presumption of unseaworthiness as raised so unequivocally in the cases cited. How can you distinguish the "Nottingham", leaking immediately after leaving port in the fairest kind of sailing weather (Ap. 299-301), with the leak increasing in similar weather until she was nearly water-logged, from the barge in *The Arctic,* supra? We cannot. How can the condition of the steam pump, which had not been tried on the bilge for many months, be distinguished from that of the pump in *Benner Line v. Pendleton,* supra? We do not know.

What more appropriate words could be found descriptive of the "Nottingham's" condition than the following by the court in that case:

> "The court below thought the inference was irresistible that the *pumps which failed were not fit to use* when the ship began its voyage. That inference seems justified, and, if justified, *the conclusion is unavoidable that the ship was not seaworthy in this respect also, when she started on the voyage.*" (Italics ours.)

In those two cases last referred to the presumption of unseaworthiness was conclusively raised. There are no reasons, then, for its not being raised on the same grounds against the "Nottingham".

Unseaworthy in Fact.

On the contrary, it appears that when the "Nottingham" was drydocked at St. Johns, a crack was discovered in the flange to the water closet soil pipe, and that a seam without oakum was found at the hood ends on the stern post (Ap. 392, 400, 407-416, 423-426, 441, 352-7, 294-8, 312, 317). The crack in the flange and the seam without oakum, were both on the port side which was the low side when the vessel was upon the starboard tack (Ap. 319), thus accounting for the increase of water which made its appearance immediately after the "Nottingham" was put upon that tack (Ap. 262). There was in this, the only explanation of the source of leakage, an accounting therefor directly attributable to an actual unseaworthiness of the vessel.

THE POLICIES WERE VOIDED BY UNSEAWORTHINESS.

The "Nottingham" being unseaworthy, the policies were voided.

Whatever may be the general law, the California Civil Code and the Washington Insurance Code provide as follows:

> Cal. sec. 2681. "In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy." (Wash., sec. 127.)
>
> Cal. sec. 2682. "A ship is seaworthy, when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy." (Wash., sec. 128.)

Cal. sec. 2683. "An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases:

1. When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time; and,

2. When the insurance is upon the cargo, which, by the terms of the policy, or the description of the voyage, or the established custom of the trade, is to be transshipped at an intermediate port, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped or transshipped, be seaworthy at the commencement of its particular voyage." (Wash., sec. 129.)

Cal. sec. 2684. "A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables, and anchors, cordage and sails, food, water, fuel, and lights, and other necessary or proper stores and implements for the voyage." (Wash. sec. 130.)

It was held by the District Court for the Northern District of California in a suit upon a marine insurance policy to recover for the loss of a vessel which had been blown ashore, that her failure to have suitable anchors, chains and hawsers constituted a breach of the implied warranty of seaworthiness in section 2683, and that such breach voided the policy.

Pope et al. v. Swiss. L., 4 Fed. 153.

That a breach of warranty voids a policy, has recently been held by this court in

Canton Ins. Office, Ltd. v. Independent Trans. Co., 217 Fed. 216.

District Court's Rulings Erroneous.

The District Court took the position that the contention that the vessel was unseaworthy and, therefore, the implied warranty was violated, and the policy voided, was not well founded. Its ruling was largely based upon a clause in the policy, which, we submit, has nothing whatsoever to do with the question of the seaworthiness of the vessel for the voyage on which this loss occurred. The court referred to clause 5 on the face of the policy, and said that it might be construed as a stipulation with relation to the seaworthiness of the vessel, since it provided for a certificate of fitness.

Clause 5 stipulates:

> "Not to load more than net registered tonnage with guano, salt, iron, stone, ore or lime. Not to carry bituminous coal in bulk, except between ports in the Pacific Ocean. Not to carry grain in bulk, nor to proceed to sea, grain laden, except coastwise, without a certificate from an inspector appointed by Underwriters upon the hull or cargo, stating that the vessel is properly laden and fitted for her intended voyage."

The clause makes no requirements whatever as to the vessel when lumber laden, and cannot be construed as a stipulation with relation to the seaworthiness of the "Nottingham" when loaded with lumber. Simply because the policy provided for the issuance of a cer-

tificate when the vessel was laden with certain cargoes, can by no possible construction be strained into a provision that the implied warranty of seaworthiness was thereby superseded when the vessel was loaded with other cargo, and yet this is the foundation of the District Court's holding.

The District Court also found that the testimony was fairly conclusive that the vessel was seaworthy. The court below heard none of the evidence, it all being taken on a reference. Its finding of fact, therefore, is not conclusive, for the hearing in this court is a trial *de novo*.

We submit that in view of the fact that the vessel sprung a leak in fairest weather, immediately after leaving port, there are no grounds upon which the court could find that the vessel was, in fact, seaworthy. It is true that she had just returned from a long voyage; that she was laden, and prior to departure for sea was inspected and a certificate of seaworthiness issued, but such certificate of seaworthiness was not issued by any agent or representative of appellant, following an examination made after the vessel had been loaded. It is true that one E. M. Cherry, Lloyd's agent, but not a surveyor, and not an agent of appellant, looked the vessel over while she was at Astoria. His certificate is in no respect binding upon appellant.

After referring to the certificate, the court's opinion proceeds to state that after entering upon the body of the ocean, she (the "Nottingham") encountered a heavy storm which tore away one of the lifeboats

and flooded the donkey room; that on the morning of the 9th of October, the deck lashings parted and released the deckload, which went overboard, and carried with it the main mast, mizzen mast, and spanker mast.

The opinion then continues in a brief resume of the incidents from that time on. The error of the District Court lies in its ignoring and passing over the fact, as we have previously pointed out, that, prior to encountering any storm which tore away one of the lifeboats or flooded the donkey room, the vessel had become practically waterlogged. The loss of the deckload and the dismasting of the vessel on the 9th, which was the first time she struck heavy weather, was after she had made so much water that it required one hour out of every four to free her, and after she had been put upon the starboard tack, when the leakage so greatly increased that the master attempted to make use of the steam pump, but found it out of order. *By the time the attempt was made to start the steam pump, the "Nottingham" was half filled with water* (Ap. 268). It is true that the steam pump was restored to working order about the 8th, but the gale of the 9th struck her before they had succeeded in freeing her of water.

In these circumstances, we respectfully submit that the District Court erred in ignoring the condition in which the ship was prior to encountering the storm of the 9th, and in overlooking the fact that even that gale was no severer than to be expected at that season of the year. The decision overlooks the fact that the dismasting of the ship was unquestionably caused by the

condition in which she had been placed by the leakage, and the inability of the master and crew to free her of the water through the deficient condition of the ship's steam pump. *On what grounds can the disregard of such facts be justified?* They were in the case by the admission of appellee's master, and were deserving of credence by the court. If due consideration be given them, then, we most respectfully submit, the court must hold that the vessel was unseaworthy at the inception of her voyage.

Unseaworthiness Pleaded.

The District Court also held that appellant, in contributing to the general average, and in its answer, admitted liability, and did not, at any time, contend for unseaworthiness until after the testimony was submitted in the case and an amended answer filed. It is true that appellant did not plead unseaworthiness in its original answer, but it did not do so because at that time it did not possess the facts of unseaworthiness. Appellee had not laid before appellant the facts which were brought out on the master's examination, but when proof was made, it became clearly apparent to appellee, in the course of the examination of Capt. Gibbs, *that the evidence which was developing, was showing an unseaworthiness on the part of the vessel.* This led to an inquiry by counsel as to whether or not the offer in evidence of a certain photograph (defendant's Exhibit 9), was with a view to establishing the claim that the "Nottingham" was unseaworthy. Thereupon, appellee was notified that appellant did not know whether it would make that claim or not, and that it depended upon

how the testimony developed; that the evidence which had recently come into the hands of appellant (through the master's testimony) made it very likely that appellant would take that position because it was then believed that facts to support the charge of unseaworthiness would be adduced from the master of the vessel from statements, which he had made during the examination pointing to that condition. Notice was thereupon given that if the testimony adduced in the case developed unseaworthiness of the vessel on sailing, the pleadings would be amended to conform to the proof (Ap. 394-5).

Accordingly, after proof was taken, an amended answer was filed to the amended complaint, and in it the unseaworthiness of the vessel, in conformity with the proof adduced, was pleaded.

In these circumstances, we respectfully submit that the District Court erred in holding that appellant had waived its right to question the seaworthiness of the "Nottingham," and that error was committed in not holding that the "Nottingham" was unseaworthy at the commencement of her voyage, and that the policies were thereby voided.

II.

THE COST OF RESTORING THE "WM. NOTTINGHAM" TO HER FORMER CONDITION DID NOT AMOUNT TO A SUM SUFFICIENT TO MAKE A CONSTRUCTIVE TOTAL LOSS UNDER THE POLICIES.

THE TERMS AND CONDITIONS OF THE POLICIES.

The Fireman's Fund Insurance Company, appellant, issued two policies of marine insurance, one for $6,000

and the other for $24,000, wherein and whereby it insured The Globe Navigation Company, appellee, in the aforesaid amounts, against perils of the seas, upon its interest as owner in the schooner "Wm. Nottingham", valued at $45,000, for the period of one year from the 20th day of April, 1911, to the 20th day of April, 1912.

Policies Did Not Cover Partial Loss.

The policies insured appellee against actual total loss, constructive total loss, general average, salvage charges and claims under the three-fourths running down clause. *They did not insure appellee against partial loss.* Such insurance could have been procured for an increased rate (Ap. 491).

Inasmuch as the "Nottingham" was not an actual total loss, for she was restored to her owner through the salvage services of the tug "Wallula", and as the policies did not cover partial losses, the question with which the court is presently concerned, is whether the cost of restoring the vessel to her former condition (i. e., before she was damaged) amounted to a sum sufficient to make a constructive total loss.

Abandonment Necessary.

It is settled law that the right to claim for a constructive total loss is conditioned upon an abandonment therefor being made. This court so held in

Soelberg v. Western Assur. Co., 119 Fed. 23, 29,

wherein Judge Hawley said, while considering a policy of similar form to those in suit:

> "There is a constructive total loss where the insured has the right to abandon."

And again, in

Standard Marine Insurance Co. v. Nome Beach L. & T. Co., 133 Fed. 636, 643,

Circuit Judge Ross, delivering the opinion of the court, said:

> "A constructive total loss is one upon the happening of which the insured may abandon the subject matter of the insurance.'

It is said by the author in

Am. & Eng. Ency. of Law, 1st ed. Vol. 14, p. 395:

> "Notice of abandonment is absolutely essential to enable the assured to recover for a constructive total loss."

So in

26 Cyc., 697,

it is said:

> "An election and notice of abandonment is a condition precedent to a claim for a constructive total loss."

Parsons on Insurance, Vol. 2, 107;

Arnould on Marine Insurance, 8th ed., Sec. 1092;

Phillips on Insurance, Vol. 2, Sec. 1491.

Conditions of Abandonment.

The pertinent question, then, is: Under what conditions could appellee abandon the "Nottingham" as for a constructive total loss? These conditions are expressly provided by stipulations upon the faces of the policies and rules of adjustment on the backs thereof.

Clause 9 on the faces of the policies provided:

> "It is also agreed that the insured shall not have the right to abandon the vessel unless the amount

> which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured."

That is to say, the amount insured being $30,000, *appellee did not have the right to abandon the "Nottingham" unless the amount which appellant would be required to pay under an adjustment as of partial loss for labor and materials* (exclusive of salvage or general average expenses and the cost of funds), *would have exceeded $15,000.* This, then, brings us to the further question as to the amount which appellant would have been liable to pay under an adjustment, as of partial loss for the labor and materials necessary to a restoration of the "Nottingham" to her former condition. The rules which would govern such an adjustment are embodied in clause 8 on the faces of the policies, and in the Rules of Adjustment on the backs thereof.

Clause 8 provided:

> "It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured (except on anchors, copper and calking under the copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss. And it is especially agreed that, instead of deducting one-third for new on the expense of remetaling, including docking and calking, there shall be deducted two and one-half per cent of the cost of remetaling, docking and calking, after deducting the value of the old metal and nails, for each and every month the metal shall have been on the vessel at the

> time when it is taken off; and if it shall have been on forty months or more, the cost shall be wholly borne by the insured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured."

Rule II, Sec. 2 of the Rules for Adjustment of Losses, on the backs of the policies, the only part applicable to this case, provides:

> "2. When a vessel is docked, or hove out for the two-fold purpose of remetaling (or, if on a single bottom, recalking) and repairing keel or bottom by reason of having collided or stranded, then the expense of docking or heaving out shall be proportioned pro rata upon coppering and (or) calking and other repairs, in the proportion of the number of days' work expended upon each respectively. The above rules shall also apply to wharfage, but no wharfage shall be allowed for, except when indispensably necessary to the repairing of the vessel."

We shall hereafter show that, based upon the bid of $20,950 of the Albina Engine and Machine Works (Ap. 40, 50), and certain additions thereto, the amount which appellant would have been liable to pay under an adjustment as of partial loss for the labor and materials necessary to restore the "Nottingham" to her former condition, would fall far far below the required $15,000.

Effect of Marginal Clause?

It is contended by appellee that the following clause on the margin of the policies,

> "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths (¾) running down clause",

overrides clauses 8 and 9 and the rules on the backs of the policies, and either (1) gave appellee the right to abandon under the general American law, to wit, if the cost of repairs amounted to one-half the value of the vessel repaired, or (2), if not overriding the policy provisions in their entirety, modified clause 9 so as to require the addition of general average and salvage charges to the amount which appellant would be required to pay under an adjustment as of partial loss for the labor and materials necessary to a repair of the vessel.

If appellee's first contention was sound, we admit that a constructive total loss existed. On the other hand, if the second contention should be accepted as establishing the grounds of abandonment under the policies, still, on the basis of any estimate properly to be considered on the evidence adduced, a constructive total loss would not be made out.

Marginal Clause Consistent With Body Provisions.

But *we do not admit the correctness of either position.* Appellant's contention, and we believe that every reasonable intendment of the policy sustains such construction, is that *the marginal clauses are not inconsistent with clauses 8 and 9, but that all of the provisions of the policies can be construed so as to give to all their full effect.* In doing so, a well settled rule of construction will be applied.

It was so held by the Supreme Court in

Merchants Mutual Ins. Co. v. Allen, 121 U. S. 67; 30 L. ed. 858-9,

wherein it was said:

> "It is true that if there is a conflict between the written words of a policy, and those that are printed, the writing will prevail, but, *if possible, the writing and the print are to be construed so that both can stand.*" (Italics ours.)

Similarly, in

Seton v. Delaware Ins. Co., Fed. Cas. 12675,

the court said:

> "But the construction of policies of insurance, is governed by the same rules as apply to other written instruments; and *if all the clauses can be fairly made to stand together, and to have effect, they should be so expounded as to produce such a result.*" (Italics ours.)

Marginal Clauses Definitive.

The marginal clauses are definitive of the kind of insurance provided by the policies, and neither detract from the full operation of the clauses in the bodies of the policies, nor add any liability thereto (Ap. 487, 492, 497-8). That this is true appears from a plain interpretation of the policy.

By examination of the original policies, the court will note that in clause 1, on the face, the words "unless amounting to at least..... per cent net" have been deleted with red ink. *The effect of this was to make the policy a total loss policy,* for it leaves the policy reading:

> "but no partial loss or particular average shall in any event be paid under this policy" (Ap. 486-7).

When, then, the marginal clauses were also endorsed thereon providing: "This insurance is against total and/or constructive total loss * * *," *they but stated that which the policies, by the body provisions, already insured against,* to wit, total and/or constructive total loss. *The marginal clauses, in that aspect, then, were not inconsistent with, but only definitive of, the body provisions.* Were this not so, and had the intent been to *create* the total and constructive total loss, liabilities of the policies through the marginal clauses, then there must be attributed to the "red ink deletion" a needless act, for, if the marginal clauses were to override the body provisions, changes upon the latter were unnecessary.

The body provisions of the policies also insured appellee against general average and salvage charges under clause 6 and that portion of clause 3 stipulating:

> "And all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which Insurers are liable, by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy" (Ap. 495-6).

Sec. 2711 of the Civil Code of California provides:

> "Where it has been agreed that an insurance upon a particular thing, or class of things, shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless;

but he is liable for his proportion of all general average loss assessed upon the thing insured." (Italics ours.)

Sec. 2744 provides:

"*A marine insurer is liable for a loss falling upon the insured,* through a contribution in respect to the thing insured, *required to be made by him towards a general average loss* called for by a peril insured against." (Italics ours.)

Sec. 2079 provides:

"Any person, other than the master, mate, or a seaman thereof, who rescues a ship, her appurtenances, or cargo, from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the title on Liens; but no claim for salvage, as such, can accrue against any vessel, or her freight, or cargo, in favor of the owners, officers, or crew of another vessel belonging to the same owners; but the actual cost at the time of the service rendered by one such vessel to another, when in distress, are payable through a general average contribution on the property saved."

Thus, by virtue of the above quoted provisions from clause 3, general average and salvage charges were already, without the aid of the marginal clauses, covered by the policies. Similarly with respect to claims under the three-fourths running down clause. The policies contained the following clause, printed, as were the body clauses, not typewritten, on the margin:

"It is agreed that, if the vessel hereby insured shall come into collision with any other vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the vessel hereby insured, in respect of

injury to such other vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other vessel the insurers will pay the insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the vessel hereby insured (but not exceeding in any event the amount of this policy). But this agreement is in no case to be construed as extending to any sums which the insured may become liable to pay, or shall pay in respect of loss of life, or personal injury to individuals, from any cause whatever."

Marginal Clause Does Not Initiate Liability.

Thus, it is clear that *the endorsement of the marginal clauses upon the policies,* reciting:

> "This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under the three-fourths (¾) running down clause,"

imposed no additional liability upon appellant to that which would have existed if the marginal clauses had been left off.

That the marginal clauses could not have been intended to initiate liability is demonstrated by their wording: *"This insurance is against* total and/or constructive total loss of vessel *including * * * and/or claims under three-fourths* (¾) *running down clause."* Claims under three-fourths (¾) running down clause! Manifestly, reference is made to some clause known as the *three-fourths* (¾) *running down* clause. Where do we find it? Why, among the printed clauses of the policies. They are *claims* under that clause that are *included. If claims under that clause,* then *that* clause *must create*

liability for such losses under the policy. The clause elaborately provides the conditions and extent of liability for collision damages to other vessels. It *initiates* liability. If the marginal clause was intended to *initiate* liability on the part of the insurer for such losses, it is plain that it would be ineffective, because it makes no attempt to state what was meant by *claims* under a *three-fourths running down clause.* It was absolutely necessary to go elsewhere to ascertain the creating power which made such claims, or to find out what was included in such claims. *The clause was thus simply definitive, stating what the insurance created by the other policy conditions was:* **"This is insurance against * * *".**

The marginal clauses, therefore, added nothing to the policies nor detracted therefrom. They were entirely consistent with the clauses in the bodies of the policies, and effect can and therefore should, be given to all without doing violence to any. The marginal clauses were, therefore, but definitive in character, succinctly stating the kind of insurance which the policy otherwise, by its body clauses, provided. *There is no reason, then, for holding that the marginal clauses overrode the other policy provisions.* In so deciding the District Court erred.

Marginal Clauses Silent on Abandonment.

There is nothing in the marginal clauses which, by any possible interpretation, refers to the right of abandonment. The clauses are silent upon the subject. Being silent, they are not, therefore, in conflict with clause 9, of the body provisions, which specifies the conditions on

which an abandonment can be made. The latter clause, as was said by the court in *Searles v. Western Assurance Co.,* 40 So. 866, in discussing a similar clause, "is just as much a part of the insurance policy as any other stipulation or condition contained in the policy". This being true, *then clause 9 must be given full effect unless the marginal clause is inconsistent therewith.* But *inasmuch as the marginal* clause simply states the character of the insurance, and *makes no mention of abandonment,* or of the grounds on which an abandonment can be made, *it cannot be inconsistent with the clause 9, which only relates to the right of abandonment.*

Clause 9 provides that:

> "the insured shall not have the right to abandon unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials *(exclusive* of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured." (Italics ours.)

Marginal Clause Does Not Modify Abandonment Clause.

Appellee contends that, because the marginal clause provides:

> "This insurance is against total and/or constructive total loss of vessel *including* general average and/or salvage charges and/or claims under the three-fourths (¾) running down clause" (italics ours),

that clause modifies, if it does not entirely override, **clause 9, so as to require general average and salvage charges to be added to the amount which appellant would be liable to pay** under an adjustment, as of partial loss

for labor and materials for the purpose of determining whether appellee had the right to abandon. This suggestion is made solely because of the use of the word *excluding* in clause 9, and of the word *including* in the marginal clause, and yet they are not used in the same context in any respect. In the one case (marginal clause), it is used in stating what the insurance is against; in the other, what shall not be taken into consideration in determining whether the right to abandon exists. The marginal clause makes no reference to abandonment; clause 9 has nothing to do with the kind of insurance, for it is alone concerned with the conditions on which the right of abandonment exists. There is, then, nothing in the wording of the two clauses, or in the functions which they perform, by which the one can be said to be inconsistent with, or even have anything to do with, the other.

The fallacy in appellee's contention is easily exposed. *The words,* or provision, as it may be termed, in the marginal clause *"and/or claims under three-fourths running down clause"* stand in exactly the same relation to the balance of the clause as do the words *"general average and/or salvage charges". If,* therefore, *by virtue of the wording of the clause: "including general average and/or salvage charges * * *", general average and/or salvage charges are to be added* to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (clause 9), for the purpose of determining whether the right to abandon exists, *then, equally must claims under the three-fourths running down clause be so*

added. But this is a manifest absurdity! An examination of the three-fourths running down clause at once discloses that it insures appellee against three-fourths of its liability for damages done to another vessel with which the "Nottingham" might be in collision. Now, the basic principle upon which the doctrine of constructive total loss rests, and has always been founded, is that of damage to the insured vessel. English law provides that the cost of repairing the damage must exceed the value of the insured vessel when repaired; American half the value. By policy terms, other conditions have been for years prescribed. *It would do violence, then, to every principle upon which the theory of constructive total loss is based, to hold that claims under a three-fourths running down clause could be added to the cost of repairing the physical damages to the insured vessel, to make such a loss.* And yet, if by virtue of the marginal clause, it is held that general average and salvage charges are to be added to the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, *claims under the three-fourths running down clause must also be added.*

How unreasonable it would be to hold that, if the "Nottingham" had sunk the "Manchuria", valued at two millions, under circumstances which rendered the former liable, and had herself suffered only slight injuries, the "Nottingham" could have been abandoned under the policies as for a constructive total loss. The absolute absurdity of the proposal is its best refutation.

Is it any wonder, then, that *every witness* questioned upon the subject, *including the manager of the adjusting department of the firm employed by appellee to make an adjustment in this very case,* which firm had in previous years placed appellee's insurance, *stated that he had never heard of claims under a three-fourths running down clause being so added* (Ap. 489, 498-9, *502*). No recorded decision can be found, so far as we are aware, in which it has been done. We challenge appellee to cite the court to one!

Abandonment Clause Enforceable.

It is appellant's contention, therefore, that a rational construction does not make it possible to hold that general average and salvage charges are to be added to the amount which it would be liable to pay under an adjustment as of partial loss for the labor and materials necessary to a restoration of the "Nottingham", for the purpose of determining whether the right to abandon existed. If not, then the marginal clause is not inconsistent with, and does not override, clause 9, but that *effect is still to be given clause 9 in accordance with its terms.*

Furthermore, there can be no possible conflict between the marginal clause and clause *8* of the body, for they do not touch upon, or in any way refer to, the same matter. Clause 8 has to do alone with the determination of liability under an adjustment of partial loss. So with the Rules of Adjustment on the backs of the policies. By no strained construction, then, can the marginal clauses be said to override

and supersede these clauses. The latter are, and remain, therefore, fully operative as the rules by which the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, is to be made. And having determined that, clause 9 comes in and provides that if such amount exceeds half the insurance, the right to abandon exists.

In these circumstances, we most respectfully submit, that the District Court erred in holding that the marginal clause changed the stipulations in the body materially. How they were changed or wherein the marginal endorsement could not be reconciled with the body of the contract, the court did not attempt to say. It contented itself with simply so saying in a paragraph inserted in a portion of its opinion in which it was discussing the seaworthiness of the vessel.

All Clauses Consistent.

There is no inconsistency in any of the clauses. Every intendment, therefore, will be given full effect by the court holding that the policies are, as the marginal clauses state, and the body provisions create, against total and/or constructive total loss of the vessel including general average and/or salvage charges and/or claims under the three-fourths running down clause, and by holding that the right to abandon as for a constructive total loss is fixed by the provisions of clause 9 and its dependent clauses. That is as the policies are. In so holding, the court will be applying the settled principles of construction, as enunciated in the foregoing cases.

Policy Conditions Enforced.

Policies of the form in suit have long been in use (Ap. 485), and consistently enforced by the courts.

Hall v. Franklin Ins. Co., 9 Pickering 466;
Winn v. Columbian Ins. Co., 12 Pickering 278;
Deblois v. Ocean Ins. Co., 16 Pickering 303;
Orrok v. Commonwealth Ins. Co., 21 Pickering 456;
Allen v. Commonwealth Ins. Co., 1 Gray 154;
Bullard v. Roger Williams Ins. Co., Fed. Cas. 2122;
Wallace v. Thames & Mersey Ins. Co., 22 Fed. 66;
Soelberg v. Western Assn. Co., 119 Fed. 23;
Arnold on Marine Insurance, 8th ed., Sec. 1134;
Phillips on Insurance, 5th Ed., Sec. 1544;
Barber on Principles of Insurance, p. 307.

This form of policy was first adopted by the Boston Underwriters as early as 1830, following the prolonged litigation in the Argonaut case.

Peele v. Insurance Co., Fed. Cas. 10905.

Its validity has been recognized by this court in

Soelberg v. Western Assur. Co., supra,

wherein District Judge Hawley, in considering a policy of the same form, said:

> "*Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply only to other and different kinds of contracts.* * * *
>
> "In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. *They must bring their case within*

the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authority. * * * (Citing cases.)

"We are of opinion that these authorities sustain the proposition that the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove either an actual total loss or a constructive total loss, and does not prove a partial loss. * * *

"But it is unnecessary to decide in the present case whether the amount of the insurance of $15,000 in the one case, of $5000 in the other, or $75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, *because no evidence appears in the record to give any basis watever for the determination of the percentage of damage.* The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs, which is, as we have heretofore attempted to show, wholly insufficient." (Italics ours.)

Evidence for the determination of the percentage of damages was necessary in that case, because the policy contained clauses, also numbered 8 and 9, identical in terms with clauses 8 and 9 of the policies in suit. Evidence to form a basis of computation under those clauses was necessary, both to the determination of the partial loss and of the right to abandon as for a constructive total loss. Thus full vigor was recognized by the court as inhering in clauses 8 and 9.

The validity of a very similar policy was affirmed, and the policy enforced, in the case of

Searles v. Western Assur. Co., supra,

wherein suit was brought for a constructive total loss. The right to abandon rested upon the following condition:

> "There shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster, exclusive of cost of raising and rescuing the vessel and taking her to the dock and any general average charges, be equivalent to seventy-five per cent of the agreed value of the vessel, as specified herein. * * *"

Of the binding effect of the policy conditions, and particularly of those prescribing the grounds on which abandonment could be made, the court said:

> "There are many definitions as to what constitutes a constructive total loss, and, when a constructive total loss is claimed because of damage done the vessel by the perils insured against, the English and American authorities are not in accord as to the extent of the damage required before the insured is justified in abandoning the vessel, and claiming the amount insured for as being due him on account of a constructive total loss.
>
> "*But we have no concern with the conflict of decisions, since the insurance company by express stipulation in the contract of insurance has removed that question from the controversy by stipulating what amount of damage shall constitute a constructive total loss, since it is provided in clause 8 of the policy that 'there shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster (exclusive of the cost of raising or rescuing the vessel*

and taking her to the dock and any other general average charges) be equivalent to 75 per cent. of the agreed value of the vessel as specified herein.' Therefore, as the facts in this case show that the damage to the vessel was caused by a storm on the river, one of the perils insured against under the policy, we may define a constructive total loss, as applied to this case, to be such a loss as that the repairs made necessary thereby, exclusive of raising or rescuing the vessel and taking her to the dock, would be equivalent to 75 per cent. of her value. 14 Ency. of Law (1st Ed.) 390, and authorities there cited; Vance on Ins., 557. * * *

"The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy.

"Appellant undertakes to show his right to abandon the vessel as for a constructive total loss by showing that there were no facilities at Vicksburg for raising a vessel, and it was therefore impossible for him to do so, and that the nearest dock where the vessel could have been docked was New Orleans, some 400 miles away by river, and make this an element of damage, showing as to him the boat was worthless, and therefore he had the right, under his policy, to abandon and sue for a constructive total loss. * * *

"But the insurance company has not undertaken to guarantee facilities at Vicksburg for raising vessels, nor cost of carrying her to the dock. The policy was given by the insurers and accepted by the insured under such conditions and with such facilities as Vicksburg possessed. * * *

"Therefore, in determining whether appellant had the right to abandon the vessel and sue for a constructive total loss, we consider only the cost of necessary repair, caused solely by the disaster, which in this case is shown to be much less than 75 per cent. of the agreed value."

It, therefore, follows that the right of appellee to abandon its interest in the "Nottingham", as for a constructive total loss, was determinable by the conditions of clause 9, and that such right did not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) should exceed half the amount insured, to wit, $15,000.

The evidence shows that it would not.

THE EVIDENCE SHOWS THAT THE AMOUNT WHICH APPELLANT WOULD BE LIABLE TO PAY UNDER AN ADJUSTMENT OF PARTIAL LOSS FOR LABOR AND MATERIALS * * * DID NOT EXCEED $15,000.

But first as to the notice of abandonment.

Written Notice of Abandonment.

The "Nottingham" was towed into Astoria on Sunday, the 15th, the day after the master and crew were landed (Ap. 284-5). On the morning of the next day, the 16th, a written notice of abandonment was served upon Frank G. Taylor, agent of appellant, at his Seattle office (Ap. 157-8). This was immediately refused (Ap. 338, Exhibits 16, 17). The giving of the notice of abandonment was pleaded in the libel, and a copy of it attached thereto as an exhibit (Ap. 6-7, 12). The libel was filed on May 13, 1912, and the evidence referred to was taken in July and September, 1913, at Seattle.

Alleged Verbal Notice of Abandonment.

Thereafter, on November 13, 1913, at the close of his deposition given in San Francisco Mr. Thorndyke, manager of appellee, testified that late in the afternoon of the 14th, the day the master arrived at Astoria, and the day before the "Nottingham" was towed in, he called Mr. Taylor, agent of appellant, by telephone, and notified him that he had received a telephone message from Mr. Plummer, of the Puget Sound Tugboat Company, wherein Plummer said to him: "Thorndyke, did you hear about the 'Nottingham'," and he (Thorndyke) said "No"; and thereupon, Mr. Plummer stated that "the 'Nottingham' had been dismasted and waterlogged and abandoned at sea and the crew taken off by the schooner 'David Evans', that he had received a wireless message from a master of one of his tugs to that effect". Thorndyke then said that he also stated to Taylor "that the 'Nottingham' has probably gone, it would be the last of her, and that I guessed now she belonged to the underwriters, and, in that way, informed him of our intention to abandon the vessel because she was lost, she was dismasted and waterlogged, and had no crew aboard, and was lost on the ocean" (Ap. 551-3).

At the conclusion of that testimony, counsel gave notice of his intention to apply for leave to amend the libel, to allege abandonment on the 14th of November (October), instead of at the time alleged in the libel already filed (Ap. 553). An amended libel was filed on March 10, 1914 (Ap. 118).

On cross-examination, it appeared that this alleged "verbal abandonment" had come to Thorndyke's mind after he had given his testimony at Seattle in July and September. What it was that had served to refresh his recollection, he could not say. He had been examined upon the matter on the former occasions, but had then made no reference to the so-called verbal abandonment. He had in the meantime, however, read over his testimony and discussed with counsel the bearing that they thought it would have upon the case (Ap. 553-560).

Immediately after the deposition of Mr. Thorndyke was taken, Mr. Taylor was called as a witness in the case, and testified that he left Seattle on the nine o'clock boat for Tacoma on the morning of October 14th, and that he did not return home until nine p. m. He produced a diary which contained a careful record of his movements and doings on the 14th, thus corroborating his own recollections. Mr. Taylor was not in his office at all that day, and most emphatically stated that he had no telephone communication with Thorndyke on that day, and that the first time notice of abandonment was given, was on the afternoon of the 16th, when the written notice was served (Ap. 448-457).

Appellee did not know of the existence of the diary when Mr. Thorndyke testified to his *new* recollection. Its entries confounded them, and effort has been made, and doubtless will be renewed in this court, to get away from its effect by suggesting that the information which Mr. Taylor got late at night, after his return

home, and which he thought, and had reason to believe, came as customary from the Merchants Exchange, but frankly admitted could not be stated with absolute certainty, was received from Mr. Thorndyke. *But Mr. Thorndyke never stated, or suggested, that he talked with Mr. Taylor after nine o'clock at night. His testimony on November 13, 1913, was that the alleged conversation was with Mr. Taylor in the afternoon, while the latter was at his office.* Explanation of the discrepancy cannot be explained upon that ground.

It is certain that there never was a conversation between Taylor and Thorndyke on Saturday, the 14th. The giving of a notice of abandonment was a matter of great importance to both Mr. Thorndyke and Mr. Taylor. So much so, indeed, to the former, that it is now stated that the draft of the notice served on Monday afternoon, was prepared by one of the counsel for appellee, at his home, before eleven o'clock on Sunday morning (Ap. 558).

It appears from the diary that Mr. Taylor was a most methodical man in the conduct of his business, making careful entry of his transactions day by day. It seems only reasonable, therefore, that if notice of abandonment had been given at any other time than that noted in the diary, either verbally, or in writing, that Mr. Taylor would have made a like notation. If Mr. Thorndyke had gone outside of business routine, and called Mr. Taylor at the latter's home late on Saturday night, the 14th, to abandon to him the "Nottingham", is it not reasonable to believe that he would have had *some* recollection of that act at the time he

testified in July and September, 1913, when he was specifically asked about the abandonment which had been made, or at least when he was advising with counsel in preparation of the case?

Charity induces us to say that Mr. Thorndyke was mistaken. He never gave any notice of abandonment on Saturday, or at any other time prior to the delivery on Monday afternoon of the written notice which had been drafted on Sunday morning. *If abandonment had been made on Saturday night, why the haste in preparing a written notice on Sunday morning, before eleven o'clock, which notice was not in confirmation of, and made no reference to, an attempted abandonment on the night before?* The fact is that Mr. Thorndyke's memory was unreliable. This is not only shown by the continued evasiveness of his answers throughout his testimony, but is most emphasized by the remarks of his own counsel, who said to him, at the time his deposition was being taken in San Francisco, immediately after he had testified to the new recollection, *"there is no use testifying to things that are manifestly untrue"* (Ap. 557).

Verbal Abandonment Insufficient.

But even if the alleged conversation had taken place with Taylor, it did not constitute a sufficient abandonment. Mr. Thorndyke said that his words of abandonment were:

> "And I also stated to Taylor that the 'Nottingham' had probably gone, it would be the last of her, and that I guessed now she belonged to the underwriters" (Ap. 552.)

And again:

> "I stated to him the telegram. I stated to him regarding the wireless that Plummer reported that he had received, and I also stated that the 'Nottingham' was apparently a goner, as I remember using the expression at that time; that she was lost" (Ap. 560).

There were no words of transfer or of conveyance in either statement, by which appellee surrendered up to appellant, its interest in the "Nottingham", and yet that is the requirement of a valid abandonment.

> *Patapsco Ins. Co. v. Southgate,* 5 Peters 604; 8 L. ed. 243.

We submit, therefore, that no abandonment was made on Saturday, the 14th, as alleged in the amended libel.

Furthermore, Mr. Thorndyke had no power to make a valid abandonment.

Verbal Abandonment Unauthorized.

It is alleged in the libel and admitted in the answer that the "Nottingham" was mortgaged to the Trust Company of America. Mr. Clise testified that he looked after the administrative affairs of The Globe Navigation Company, and Mr. Thorndyke after the operations of the vessel. Mr. Clise also stated that he likewise looked after the Trust Company's interests as trustee of the mortgage bonds (Ap. 339). After thus testifying, Mr. Clise said that a written notice of abandonment (Exhibit 16) was given under his direction, acting as the representative and attorney of both The Globe Navigation Company and the Trust Company of America (Ap. 340).

When Mr. Thorndyke's deposition was taken in San Francisco, however, he revealed the fact that Mr. Clise was not in Seattle at all, but was in San Francisco when the written notice of abandonment was given (Ap. 560). How, then, the written notice of abandonment was given under the latter's direction is not disclosed to us. But be that as it may, there is no evidence to show that Mr. Clise, as the only authorized representative of The Globe Navigation Company, or the Trust Company, had any knowledge of the alleged verbal abandonment until after Mr. Thorndyke took the matter up with his counsel nearly two years after the loss (Ap. 560).

There was, then, no valid verbal abandonment, even if credence be given to Mr. Thorndyke's testimony regarding the alleged conversation.

It is stated in *Arnould on Marine Insurance*, 8th ed., p. 1433:

> "So, again, it has been there (United States) held that if the assured by mortgaging his ship has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon, but can recover only for the damage he has actually sustained as a partial loss."
>
> *Soelberg v. Western Assurance Co.*, supra;
> *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249.

Court's Confusion About Abandonment.

It is important to note the apparent confusion of the District Court between an abandonment as for a constructive total loss under the policies, and the physical abandonment of the vessel by the crew at sea. They were totally dissimilar abandonments, bearing no relation whatsoever to each other.

The court then referred to a provision of the Civil Code of California as prescribing the grounds upon which an abandonment could be made. It also quoted an excerpt from *Cyc.* *But neither of those provisions had anything to do with the right of abandonment under the policies in suit, for the policy stipulations fixed the conditions upon which abandonment could be made.* This was clearly pointed out in

> *Soelberg v. Western Assur. Co.,* supra;
> *Searles v. Western Assur. Co.,* supra.

That the District Court could not have considered section 2717 of the California Civil Code, or the rule in *Cyc.* (*29 Cyc.,* 692) applicable, is shown by the fact that when it came to make its computation to determine whether there was a constructive total loss, *the court made a deduction of one-third new for old from the cost of repairs.* Now, *neither the Civil Code provision nor the rule in Cyc. authorized such deduction.* When, then, the District Court made it, it was not applying those rules to the present case.

Such deduction was not authorized by the marginal clause, but only by clause 8 in determining liability under an adjustment as of partial loss for labor and materials. Such basis of ascertaining the right to abandon was prescribed by clause 9. Hence the District Court must have been attempting to apply *those clauses* to the facts. This is further shown by the court saying that

> "in determining whether there is liability, the court must determine whether the loss was more than one-half of the payment required under the policy".

Such condition to liability is alone provided by clause 9. No provision of that character is found in the California code, the general law, or the marginal clause. The court, then, must have intended to apply the conditions of the body clauses to the facts, but did so erroneously.

Adjustment as of Partial Loss.

After the "Nottingham" was taken into Astoria, she was towed up the river to St. Johns (adjoining Portland) and there drydocked *for the purpose of ascertaining the cost of repairs, so as to determine whether she was a constructive total loss under the policies* (Ap. 370-1).

Much is attempted to be made of the risk of that towage, but it clearly appears from the testimony of Captain Gibbs and the master that such risk as there may have been, was only such as is incident to every towage on the Columbia River between the same ports. At the time it was made, the "Nottingham" was free of water and was not drawing as much water as when she went to sea, because, by the loss of her deck load and masts, her burden had been lightened (Ap. 322).

Repair Specifications Prepared.

Upon being drydocked, the "Nottingham" was surveyed, on December 21, 1913, by Frank Walker, representing appellee, and Captain Crowe, deceased, representing appellant. Following such survey, Mr. Walker prepared specifications for her repairs (Ap. 162, 173), and bids for the same were called thereon (Ap. 162, 173-4, Exhibit 1).

Bids for Repairs.

Captain Crowe furnished the names of parties in Portland who might bid on the vessel. To these, copies of the specifications were handed, and bids asked. Four tenders were received, as follows: Oregon Drydock Company, $25,200; St. Johns Shipbuilding Company, $23,070.75; Vulcan Iron Works, $24,600; and *Albina Engine and Machine Works, $20,950* (Ap. 41, 162-3).

The specifications provided as part of the requirements:

> "Tenders are hereby requested for making the following enumerated repairs and supplying all of the sails, stores, outfit and equipment contained in the list attached to this specification.
>
> "Vessel to be taken from where she now lies by the contractor and returned to same berth by him or them after all repairs are completed, contractor to pay all costs of removal and return.
>
> *"It being the intention of the following specification to briefly describe the spars, running and standing rigging, iron work, sails, etc., necessary to place vessel in the same good condition as before the accident, therefore the contractor will be called upon to observe not only the letter but the spirit of the contract. The work called for under this contract to include the removal of the stumps of the old masts, the removal of the old chain plates and all work and labor necessary to install the new spars, iron work, running and standing rigging, sails, blocks, outfit, equipment and gear, and all rigging to be set up, seized off, served and sails bent in readiness to sail, to the satisfaction of the master or owner's representative."*

Accompanying the specifications was the following letter, attaching conditions to the bids:

"Owing to an agreement owners have with the Port of Portland Commission, the vessel must be docked on their floating dock at St. John's incident to necessary bottom repairs, therefore in making tender for this work, bidders must agree with the owners to carry out that arrangement, bidders of course paying all dockage and other costs.

"*Time is not the great issue herein;* but owners will weigh difference in time submitted to be consumed for doing the work, therefore bids should plainly set forth the number of running days he will consume to do the work.

"*All bidders should submit with their tender a statement from a reliable indemnity company agreeing to furnish surety bonds in sum required in the specifications.*

GLOBE NAVIGATION COMPANY, LTD."

Albina Bid Lowest.

The bid of the Albina Engine and Machine Works was the lowest. If an adjustment as of partial loss for labor and materials, under the rules of the policies, had been had upon the cost of repairs as fixed by that bid, the amount which appellant would have been liable to pay, would have fallen far, far below the required $15,000. We do not think that counsel will dispute it. Certainly there is no evidence to the contrary.

The bid was not accepted, however, and the vessel was not repaired at that time.

Walker's Supplemental Report.

On March 4, 1912, Mr. Walker made a supplemental report of survey in which he added materially to the repairs to be made to the "Nottingham", over and above those called for by the specifications. It will be remembered that *the original specifications were drawn*

to cover the repairs of the damage to the vessel which resulted from this trouble. Mr. Thorndyke so testified (Ap. 173). The elaborateness of the specifications, the detailed list of stores required, the aforementioned expression of the intention of the specifications, the conditions in the call for tenders, all permit, indeed force, the reasonable conclusion that the specifications were drawn by appellee's surveyor to cover all the work necessary to restore the vessel to a seaworthy condition. It was admitted by appellee's manager that *the purpose of drydocking the vessel was to see if it was a total loss under her policies, for the purpose of ascertaining whether or not appellee had a claim under its policies against appellant* (Ap. 371). The specifications were based upon the surveys made by the insured's and insurer's representatives, when the vessel was on the drydock for the aforesaid purpose. Is it reasonable, then, to believe that Mr. Walker could have thought that the repairs, as provided by the specifications, would not have restored the vessel to her former condition? Appellee was entitled to have its right against appellant measured by such requirement. If the specifications were insufficient, and Walker was conscious of it, then he was more then derelict in his duty to his employer. But no such claim is made by appellee. The reasonable conclusion to which we are thus driven by all of the circumstances, is that the specifications were broad enough to fulfill their intended purpose of providing for a thorough repair of the vessel. *By them, therefore, the needed repairs should be determined.*

The supplemental report, as is readily demonstrated, not only duplicated repairs required by the specifications, but called for work that was not needed, and that would not have repaired any damage caused by the disaster. The report was made on March 4, 1913; the original specifications were drawn immediately after the survey in December. Between those dates, Walker admits that he was not on board the "Nottingham", though he says that he saw her in passing up and down the river (Ap. 198). *It is thus conceded that Walker must have possessed, at the time he prepared the original specifications, all of the information which he had on March 4th, and from which he drew his supplemental report.* How, then, can it be asserted that the supplemental report should be accepted as covering repairs necessary to restore the vessel to her former condition? Walker would have us believe that the repairs provided by the supplemental report, were needed, but were omitted because Captain Crowe would not agree to them. It is imposing on credulity to ask us to accept that explanation, for *it does not sound in reason to say that Walker, in an effort to ascertain the loss for the purpose of determining liability under the policies, omitted at the request of the representative of appellant, such extended additional repairs as those set forth in the supplemental report.*

On December 21, 1911, appellee sent the following telegram to the master:

> "Walker disagrees with Captain Crowe views about leak, he thinks top sides responsible. *Wants you to make thorough examination of top sides look especially for rooms make no mention of what you*

learn over there. Please make examination Friday. *Bring equipment list with you''* (Ap. 317). (Italics ours.)

The master made his secret examination. He says that he examined the vessel thoroughly all over; that he swung stages on both sides and went all around the vessel and examined the whole top side, the butts and the seams, especially around the stern post. And with what result? Other than a seam along the stern post, a few soft spots under the counter, *he found the other seams in as good condition as when she went to sea* (Ap. 317-319). Walker had that information when he drew his specifications on Jany. 1, 1912. And what did he provide in them regarding outside hull repairs? The requirements are found on pages 101 and 102 of the Apostles, and showed a thorough going over and repair, and concluded by specifying that before the ship was again placed in water, the entire planking of hull to be searched for leaks with hose on inside. *Manifestly, that contemplated that the hull,* in which Captain Swenson found the seams in good condition, *was to be placed in a seaworthy state.* Mr. Mackintosh, who was to do that work under the Albina Engine and Machine Works' bid, understood that he would be required, under the tender, to correct any leak that developed (Ap. 86).

Following upon the survey of Walker, the secret survey of Captain Swenson, and the preparation of the specifications, Walker, without in the interim being aboard the vessel, on March 4, 1912, made up his supplementary survey, in which he provided for *the calking of the entire hull up to the bulwarks,* the seams cemented

and painted. What basis can there be for asking that this supplemental report be taken as correctly embodying repairs necessary to restore the "Nottingham" to a seaworthy condition? Absolutely none, and that this was so, was afterward admitted by counsel, who stipulated during the hearing, *that it was not necessary to calk the bottom from the third flank below the light load line down, except as provided in the original specifications; that it was not necessary to remove any portion of the shoe, except that provided in the original specifications* (Ap. 348-9).

The original specifications provided for the removal of the after length of the shoe (Ap. 102).

Supplemental Report Discredited.

Thus, it was established that the supplemental report, in two of its most important requirements, was wrong.

The supplemental report also provided for the calking of the entire deck (Exhibit "J"). The original specifications required the calking of certain carefully designated deck seams. Which was correct as to the requirement of repairs needed to restore the "Nottingham" in December to her former condition? If this court will but read a few pages of the Apostles, commencing on page 202, in conjunction with the photograph (Exhibit "2") there being used, it will quickly discern that Mr. Walker, in preparing the specifications, the items of which by his testimony he was pointing out upon the photograph, must have gone over the deck of the vessel in December with absolute thoroughness. He could not have specified the calking of the feet of all bulwark

stanchions, around the hatches, one seam on each side for the full length of the vessel, four seams along the waterways, alleyways under forecastle head, forecastle head deck searched for leaks, and all seams pitched or puttied, without, at the same time, having observed the remainder of the deck seams. Having so carefully specified the needed calking in December, we submit that the original specifications should be taken as prescribing the needed repairs to the decks, and not the supplemental report made three months after the former, during which interim the decks had not been seen by Mr. Walker. *In view of the already admitted incorrectness of the supplemental report, appellee should be held bound by the specifications.* To so hold, the court would be but accepting the finding of the shipbuilder Nelson, an independent surveyor employed by the Port of Portland, who testified that he examined the "Nottingham" in the dock, and found her outside calking good, and the decks very good, except a little loose along the covering board (waterways) (Ap. 444). The original specifications covered the latter.

In its most important requirements, the supplemental report thus stands absolutely discredited.

Walker-Gibbs Agreement.

On March 27, 1912, Captain S. B. Gibbs, acting for appellant, and Mr. Walker, acting for appellee, agreed upon the following modifications of the original specifications, relating to the repairs:

1. The renewal of the mast-steps was considered unnecessary, and the cost thereof estimated at $30;

2. The overhauling of the fore-rigging was considered necessary, but the original estimate of $150 was reduced to $75, and thus a credit of $75 allowed upon the original estimate;

3. Paint for the deck was considered unnecessary, and the difference in cost between paint and tar was estimated at $25;

4. A second coat of copper paint over the entire bottom was considered unnecessary, but it was agreed that the bare spots should receive two coats, and that one coat was sufficient for the remainder. The difference was estimated at $80;

5. Appellee originally claimed a total loss on one foresail, one foregaff topsail and one forestay sail, the value of which was estimated at $550. It was agreed that the damage to the sails was only $75, thus making a credit difference of $475;

6. It was agreed that the four gaff topsails and full suit of sail covers and five coils of manila rope stored in the 'tween deck storeroom, were unfit for further use. The value of these was estimated at $400. The replacing of those sails, etc., however, was covered by the original specifications (see Ap. 102), providing for seven gaff topsails.

7. It was agreed that the damage to the stanchions and cast-iron chocks occurred before the present voyage, and the credit agreed to be allowed on the cost of repairs, was $50;

8. It was agreed that the calking of all of the stanchions of the back wash strake and the testing of cargo

ports, and any required calking of the same, was necessary. The original specifications covered the calking of all the bulwark stanchions.

No agreement was reached as to the necessity of calking the entire main deck, the removal of the shoe from the keel and renewing the same, or the resalting of the vessel, or the removal of sheet iron from under the hose pipes. The necessity of calking the entire main deck, we have just considered. It was subsequently stipulated that the removal of the shoe, except as covered by the specifications, was unnecessary. It was likewise stipulated that the cost of resalting the vessel was $600 (Ap. 348-9).

Repairs Required.

The required repairs to restore the "Nottingham" to her former condition were those covered by the original specification and the agreements of the Walker-Gibbs stipulation of March 27th.

Effect of Clause 9.

Returning again to the provisions of clause 9, which determined the right of abandonment, we find that the *right of abandonment did not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials * * * should exceed half the amount insured.* This necessitated the ascertainment of what appellant's liability would be under such an adjustment. To determine that, appellant had such an adjustment prepared by an average adjuster. His adjustment was based upon the

Albina Engine and Machine Works' bid of $20,950, and the Walker-Gibbs agreement (Ap. 465).

Effect of Clause 8.

This adjustment was governed by the conditions of clause 8 which provide for *a deduction of one-third from the cost of all repairs of injuries and losses on the vessel* by perils insured against (except on anchors, copper and calking under the copper) *as a commutation for the average difference between new and old. The* clause also provided that *instead of deducting one-half for new on the expense of remetaling, including docking and calking, there should be deducted two and one-half per cent of the cost of* remetaling, *docking and calking* after deducting the value of the old metal and nails *for each and every month the metal shall have been on the vessel at the time when it is taken off;* and *if it shall have been on forty months or more, the cost shall be wholly borne by the insured.* It further provided that *in case the vessel should be on a single bottom, the same rule shall apply to docking and calking, but one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured.*

Rules of Adjustment.

In order to properly pro rate the cost of docking, section 2 of Rule 2 of the Rules for Adjustment of Losses on the back of the policy came into operation. That section provided that, "*when a vessel is docked* or hove out *for the twofold purpose of remetaling* (or, *if*

*on a single bottom, recalking) and repairing keel * * * then the expense of docking* or heaving out *shall be proportioned pro rata upon* coppering and (or) *calking* and *other repairs in the proportion of the number of days' work expended upon each respectively * * *.*"

Segregation of Repairs.

To make the adjustment, in accordance with the foregoing rules, a segregation of the cost of the repairs was necessary. This was done with the tender of the Albina Engine and Machine Works, at the instance of appellant, through the testimony of Wm. Cornfoot and Robert Mackintosh, who prepared the bid and were to do the work and furnish the materials under the tender. Mr. Cornfoot testified that in the bid, the allowance for consumable stores was $1500 (Ap. 50); the allowance for cabin furniture, fixtures, etc., was $1000 (Ap. 51-53). Mr. Mackintosh stated that the allowance for drydock dues was $382 (Ap. 76); the allowance for painting bottom, both labor and materials, was $330 (Ap. 77-8); and the allowance for calking and cementing bottom was $175 (Ap. 78). The foregoing items totalled $3387. Deducting that amount from the Albina bid of $20,950, for those items were covered by the bid, there was left $17,563 to cover the balance of the repairs to be made as required by the specifications (Ap. 466-471).

Credits and Additions to Repairs.

The adjustment also included the credits covered by the Walker-Gibbs agreement, to which we have referred.

Under its terms, a credit of $30 for renewal of mast-steps was allowed. (Note: The allowance under the bid was $120 for this item [Ap. 84-5]); a credit of $75 was allowed on the overhauling of the forerigging; $75 on the deck painting; $80 for copper bottom painting (one coat instead of two, as required by the specification [Ap. 102]); $475 for the three sails, valued at $550, and only damaged to the extent of $75; and $50 for damage to stanchions and iron chock which occurred before this voyage. The foregoing deductions were made from the Albina bid because it included those items.

There was added to the repairs, not in the specifications, the salting of the vessel, the cost of which was stipulated to be $600 (Ap.....), and calking the stanchions back of the wash strake, the cost of which was $277.50, as given by Mr. Hubbard, a Puget Sound shipbuilder (Exhibit 8).

Also included in the adjustment was the cost of dry-docking the vessel for the preliminary survey, from which the specifications for repairs were drawn. The cost of such dockage was $79.34, as shown by the Johnson & Higgins' general average adjustment (Ap. 479-480).

Results Shown by Adjustment; No Right to Abandon.

The foregoing costs covered the complete repair of the vessel as provided by the original specifications, as modified and supplemented by the Walker-Gibbs agreement.

With this segregation of costs in hand, the adjuster applied to those costs the rules of adjustment as pro-

vided in clause 8, and Sec. 2, Rule II of the Rules of Adjustment on the back, of the policy. *In this way, he ascertained, in accordance with the requirements of clause 9, and the conditions of the policies, the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials.* It amounted to the sum of $9540.66. *This was $5459.34 less than half the amount insured.*

Appellee, therefore, did not have the right to abandon as for a constructive total loss.

Adjustment Correctly Stated.

The adjustment, as thus stated, was in strict accordance with the settled practice of making adjustments, as of partial loss for labor and materials, under policies of the kind covering on the "Nottingham" (Ap. 478). That the adjustment was correctly made up, was admitted, and testified to, by Mr. Bishop, manager of the adjusting department of Johnson & Higgins, a leading firm of average adjusters, who, in fact, had charge of the stating of the general average adjustment on the "Nottingham", as a result of the losses suffered and expenditures incurred on the voyage here in question (Ap. 501, 528-31).

In exposition of the principles upon which an adjustment, as of partial loss for labor and materials, should be made up under the policies covering on the "Nottingham", Mr. Bishop stated:

1. That one-third should be deducted from all repairs, except calking and painting, and stores, like

provisions and things of those kind that are taken aboard (Ap. 528, 531). This deduction, according to the witness, was to be made under the provisions of clause 8, wherein it was stated that one-third should be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against * * * as a commutation for the average difference between new and old * * * (Ap. 528-9).

2. That one-third should be deducted from calking, because the stipulation in clause 8 provided that instead of deducting one-third for new on the expense of re-metaling, including docking and calking, there should be deducted two and one-half per cent of the cost of re-metaling, docking and calking * * * for each and every month the metal shall have been on the vessel at the time that it is taken off, and if it shall have been on forty months, or more, the cost shall be wholly borne by the insured. *In lieu of deducting one-third from the calking, two and one-half per cent of the cost of calking, for each month that the vessel had been calked, would be charged to the owner.* This was by virtue of that part of clause 8 providing "in case the vessel shall be on a single bottom the same rule shall apply to docking and calking * * *" (Ap. 529-530).

3. That one-third should not be deducted from the cost of painting, because, according to Mr. Bishop, the stipulations of clause 8 provided that *in case the vessel shall be on a single bottom* (i. e. a vessel that has not copper sheathing in addition to the regular planking [Ap. 478], the same rule should apply to docking and

calking, but *one-twelfth to be deducted from the cost of painting for every month the paint shall have been on the bottom, and when the same shall not have been repainted for twelve months, the whole cost to be borne by the insured* (Ap. 528, 530).

3. That in lieu of deducting one-third on anchors, copper and calking under the anchors, anchors were allowed net (i. e. without deduction, with the exception of the wooden stock), and instead of the deduction of one-third from calking under the copper, two and one-half per cent was deducted for each month from the time the vessel was last calked.

The foregoing was the usual method, according to Mr. Bishop, *"in adjusting lossess under this particular form of policy"* (Ap. 531).

In view of the high standing of Mr. Bishop in his business, and particularly because of the recognition which appellee accorded him, and his firm, by employing them to make up the general average adjustment on the "Nottingham" (Ap. 238, 334, 361), we respectfully submit that *Mr. Bishop's, as well as Mr. Wilfred Page's, testimony should be accepted as establishing that the adjustment was correctly stated.*

Adjustment Tested by Bishop's Exposition.

Let us briefly examine the adjustment (Page Exhibit 1), prepared by Mr. Page, to determine whether or not it has, in fact, been made up in accordance with the principles which Mr. Bishop said were applicable to an adjustment, as of partial loss for labor

and materials, under the policies covering on the "Nottingham".

The sum of $79.34, the cost of the preliminary drydocking, was charged to dockage to be dealt with later in the adjustment.

Of the items covered by the Albina bid:

$1500, for stores of a consumable nature, was charged to particular average, net, because, as stated by Mr. Bishop (Par. 1, supra), no deduction was made from stores of that nature.

$1000, for cabin furniture, fixtures, etc. was charged to particular average, ⅓ off, because, as stated by Mr. Bishop (Par. 1, supra) one-third should be deducted from all repairs, excepting calking, painting and stores of a consumable nature. Cabin furniture, fixtures, etc., did not fall within the last classification.

$382, drydockage dues, was charged to dockage to be dealt with later in the adjustment.

$330, for painting bottom (labor and materials) was charged to bottom painting, to be dealt with later in the adjustment.

$175, for calking and cementing bottom, was charged to bottom calking, to be dealt with later in the adjustment.

$17,563, for the remaining repairs under the bid, was charged to particular average, ⅓ off, because, as stated by Mr. Bishop (Par. 1, supra), one-third should be deducted from all repairs, except calking and painting and stores, like provisions.

On the next page of the adjustment, appear the credits allowed by the Walker-Gibbs agreement. Of these:

$30, for mast-steps, was credited to particular average, net, because, according to Mr. Bishop (Par. 1, supra), if made, they would have been a repair from which one-third would have been deducted.

$75, for overhauling rigging, was credited to particular average net, for the same reason.

$25, for painting decks, was similarly credited for the same reason.

$80, for one coat of copper paint for bottom, was credited to bottom painting.

$475, for three sails, was credited to particular average, ⅓ off, because, if they had been supplied anew, they would have been included in repairs from which, according to Mr. Bishop (Par. 1, supra), ⅓ would have been deducted.

$50, for stanchions and iron chock, was credited to particular average, net, for similar reasons.

Six hundred dollars for salting of the vessel, was charged to particular average, ⅓ off, because it fell within the class of repairs from which such deduction was to be made.

Two hundred and seventy-five dollars, for calking stanchions back of wash strake, was charged to particular average, ⅓ off, because it was a repair from which such a deduction was to be made.

The total of the dockage expense was $461.34. This expenditure was distributed over the bottom calking, bottom painting, and particular average, ⅓ off, in proportion to the number of days required to do the bottom painting, calking and other work requiring drydocking (Rule II, Sec. 2).

The necessary segregation of time was furnished by Mr. Mackintosh, and showed that the bottom painting would have required thirty days for one man; the calking and cementing, thirty-five days for one man, and the other work on the bottom, 25 days for one man, or a total of 90 days. 30/90 of the dockage, or $153.78, was thus charged to bottom painting; 35/90, or $179.41, to bottom calking; and 25/90, or $128.15, to particular average, one-third off. This eliminated dockage from further consideration.

The total cost of calking and cementing the bottom, including its proportionate share of the dry-dockage, was $354.41. This entire amount was properly chargeable to the owner, because, according to Mr. Bishop (Par. 2, supra), two and one-half per cent of the cost of the calking for every month the vessel had been calked, was chargeable to the owner, under the stipulations of clause 8. It appeared from Mr. Thorndyke's testimony that the "Nottingham" was last calked in April, 1907, over forty months prior to the date of the accident (Ap. 475-6).

The total cost of the bottom painting, including its proportionate share of the drydockage, was $403.78, one-half of which, according to Mr. Bishop (Par. 3,

supra), was chargeable to particular average, net, and one-half to the owner, because of the stipulations of clause 8, providing that in case the vessel should be on a single bottom, one-twelfth was to be deducted from the cost of painting, for every month the paint shall have been on the bottom (Ap. 530). It appeared from Mr. Thorndyke's testimony that the "Nottingham" was last painted in April, 1911 (Ap. 235). Thus, six months had elapsed to the time of the accident, making 6/12, or one-half of the cost of the bottom painting, chargeable to particular average, net, and one-half to the owner.

The foregoing thus disposes of the dockage, bottom calking and bottom painting, all having been charged to the owner, or to particular average.

The total of the items charged to particular average, ⅓ off, less the credits thereto, was $18,913.65. From that amount, according to Mr. Bishop (Par. 1, supra), one-third was to be deducted. This deduction amounted to $6314.55, leaving $12,609.10. Thus, the total of the particular average, net, was $14,310.99, and was made up of the $1500 for consumable stores, $201.89, the proportion of the cost of bottom painting, not charged to the owner, and $12,609.10, the cost of other repairs from which the deduction of one-third was made.

It appears, therefore, that the foregoing adjustment was stated strictly in accordance with the principles which Mr. Bishop said were applicable to an adjustment, as of partial loss for labor and materials, under the polices covering on the "Nottingham".

Inasmuch as the policies insured but $30,000 on a valuation of $45,000, appellant would have been liable to pay, under such adjustment, 30000/45000ths of said $14,310.99, or $9,540.66. *This amount,* as we have pointed out before, *was $5459.34, less than the amount required to give appellee the right to abandon as for constructive total loss.*

Albina Bid Challenged.

Appellee sought to get away from the effect of the Albina Engine and Machine Works' bid by asserting that Mr. Robert Mackintosh, who was to do the ship-joiner and rigging work for the bidder, did not bear a good reputation and was incompetent (Ap. 165-6). When requested to give the basis of his opinion of Mr. Mackintosh, Mr. Thorndyke, appellee's manager, admitted that he had talked with no one except Mr. Walker, his Seattle surveyor. He made no investigations of Mr. Mackintosh's responsibility, or of the character of work which he had done, but stated that he understood that Mackintosh had fallen down in repairing the steamer "Elder", which had been wrecked at Gobel, at a time when he, Mackintosh, was dock-master at the drydock, and that Mackintosh had to be dismissed in the middle of the work (Ap. 180-1). Mr. Thorndyke also claimed to have heard that Mackintosh had been in trouble with respect to work on a steamer called the "Beachley" (Ap. 375-6). How lamentably appellee failed in its challenge of the responsibility or capability of either Mr. Mackintosh or Mr. Cornfoot, is shown by Mr. Thorndyke's confession of his misinformation about

Mackintosh having any connection with the "Beachley" (Ap. 376-7); and by the fact that the only connection Mackintosh had with the "Elder", was her docking in damaged condition, for which he received due recognition for having successfully performed a very difficult undertaking (Ap. 59-60). The good record of Messrs. Cornfoot and Mackintosh, as shown by their testimony, of which there is no truthful contradiction in the record, speaks plainly enough of their responsibility. Those men could not have so successfully repaired vessel after vessel of all classes, unless they were fully equipped and possessed of high ability in their line. If they were responsible and capable enough to do similar work for the U. S. Government, they were to repair the "Nottingham" (Ap. 43, 67-8).

The businesslike manner in which they prepared to do the work covered by their bid, demonstrated that they knew what they were about, and that they proposed to do it most thoroughly.

In the absence, therefore, of any proof whatsoever that the Albina Engine and Machine Works' tender would not be carried through to successful completion, we submit that there are no grounds upon which the same can be disregarded in estimating the cost of repairing the damages to the "Nottingham". The call for bids provided that all bidders should submit with their tender, a statement from a reliable indemnity company, agreeing to furnish a surety bond in the sum required in the specifications. This condition was complied with by the Albina Engine and Machine Works,

for it submitted such a statement from McCargar, Bates & Lynch, general agents of a responsible surety company, the Aetna (Ap. 47-9, 117). Certainly that company had confidence in the responsibility of the bidders.

No Evidence of Right to Abandon.

There is no other competent evidence before the court upon which can be grounded the contention that the amount which appellee would be liable to pay under an adjustment, as of partial loss for labor and materials, would exceed half the amount insured.

Other bids were received at the time tenders were requested on the specifications, but appellee did not call any of the bidders as witnesses, and contented itself by simply offering in evidence the copies of the tenders (Ap. 162-3). It is apparent to the court that the bare bids in their total amount, could not serve any evidentiary purpose, for it was absolutely essential to the making of the required computation for determining whether there was a right of abandonment under clause 9, and the conditions of the policies, that the items going to make up the bids be segregated, as was done by Messrs. Cornfoot and Mackintosh. This was necessary to make possible the proper deductions of "thirds" off certain classes of repairs, the pro rating over bottom calking, painting and other bottom repairs, of the costs of drydocking, and the application to the cost of bottom calking and painting of the deductions based upon the time the vessel had been on her bottom since last painted and calked. *If force and effect is to be given to the provisions of clause 9, then those segregations*

of the costs of repair are absolutely essential to the application of the conditions of clause 8 and the Rules of Adjustment. Force and effect must be given clause 9, for, as we have previously pointed out, its validity and binding quality has been recognized and enforced time over time in all the courts.

But appellee neither offered, nor attempted to make, any such segregation with respect to any of the other bids. Appellee stands, then, without proof of its right to abandon, save as it is based on the bid of the Albina Engine and Machine Works. *The latter establishes, to a demonstration, that the right to abandon, as for a constructive total loss, under the policies, did not exist.* Appellee is, except for the Albina bid, in the same position as was the plaintiff in

Soelberg v. Western Assur. Co., supra,

whereof Judge Hawley said:

> "But it is unnecessary to decide in the present case whether the amount of the insurance of $15,000 in the one case, or $5000 in the other, or $75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, *because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage.*"

The District Court Erred.

The District Court erred in several particulars other than those already noted:

In the course of its opinion, it said:

> "In determining whether there is liability, the Court must determine whether the loss occasioned

> was more than one-half of the payment required under the policy'' (Ap. 572).

That is absolutely wrong, under any construction of the policies. The right to abandon, upon which liability in this case alone rests, under the terms and conditions of the policies, only exists if the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) should exceed half the amount insured. In determining whether there is liability, therefore, *the court is not to ascertain whether the loss was more than one-half of the payment required under the policies, but whether the amount which appellant would be required to pay under an adjustment, as of partial loss for labor and materials, would exceed half the amount insured.* There is an irreconcilable difference between whether the loss was more than one-half of the amount insured. and whether the amount which appellant would be liable to pay under such an adjustment is more than one-half the amount insured.

If, by any chance, the court should hold that the marginal clauses overrode the body conditions, so that the right to abandon should be determined by the general law or by the provisions of the California Civil Code, or the Washington Insurance Code, *still the court was in error for then the right of abandonment would be determined by whether or not the loss amounted to one-half of the repaired value of the vessel, and not to one-half of the payment required under the policies.*

By saying that "the court must determine whether the loss occasioned was more than one-half of the payment required under the policy," the court must have been of the opinion that clause 9 was to be enforced for it is only through that clause that "half of the payment required under the policy" could become a part of the test of the right to abandon. As we have just pointed out if clause 9 is not given effect, and the right to abandon is determined by the general law, or the California or Washington Statutes, "half the payment required under the policy" forms no part of the test. The basis of the test then would be, "half the repaired value of the vessel." Thus, it is evident from what is said in that portion of the opinion, that the court was endeavoring to apply the provisions of clause 9, but failed to do so correctly.

This intent is further indicated by the court's reference to the binding quality of the policy stipulations as to value. The valuation in the policy only comes into operation, in connection with the right to a constructive total loss, through clause 9, for the part which the valuation plays is that *it,* together with the amount of insurance, *determines what the Insurance Company will pay in case of partial loss.* In a total loss the full amount of insurance is paid irrespective of the valuation in the policy; in a partial loss, the liability is such proportion of the loss as the amount of insurance bears to the policy valuation. The valuation only comes into operation when the liability for a partial loss under the policy, is being calculated. And in determining whether there is a constructive total loss, the liability for partial

loss only becomes a factor through the enforcement of the provisions of clause 9. Under the general law, or the code, constructive total loss has nothing to do with partial loss liability, but only with repaired value. Hence, unless the court was attempting to apply the provisions of clause 9, its discussion of the validity of the valuation stipulation, was beside the question. Its consideration indicated that it was intending to apply the clause.

But in its endeavor to determine the right to abandon, from the cost of repairs, the court failed to apply correctly either the provisions of clause 9, or the codes, or the general law. In fact, it applied no principles of constructive total loss which could possibly be involved in this case, in any aspect of it whatsoever.

In the first place, the court averaged the bids. Why it refused to accept the lowest tender, upon which alone was there any evidence as to the responsibility of the bidders, the court did not indicate. As we have pointed out, the lowest bidder proved, without a shade of truthful contradiction, his thorough responsibility and capability. He stood ready to back his tender by a bond from one of the standard surety companies, as required by the conditions in the call for tenders. If that bid was responsible, then, we beg to assert, with every respectful deference to the court, that appellant had the right to have its liability determined thereby, and not by higher tenders. By taking the average of the bids, the court figured out a sum of $15,823.90, which, because it was in excess of half the amount insured, it held established a constructive total loss. If by the same process,

it had taken the lowest bid, and deducted one-third new for old, it would have had $13,966.66, instead of the $15,823.90 which it obtained by averaging the bids. Then, if it had taken 30/45 of the $13,966.66, it would have had $8,311.10, and not $10,424.44. Still following its process, if it had added the so-called salvage adjustment of $5,399.46, *the result would have been $13,710.56, less than half the amount insured.*

But the court's computation is not in accord with any principles that are applicable to the case, whatever conception is taken of it. *The court deducts one-third new for old from the total cost of repairs.* By virtue of what provision of the policy, or what rule of law? The marginal clause is silent as to any such procedure; the general law, or the codes, authorize no such deduction in determining a constructive total loss, for under them, such a loss is based upon the cost of repairs without deductions, equalling half the repaired value. *The only source through which deductions of "thirds," new for old, could be made applicable to the determination of a constructive total loss, is clause 9 of the policies.* But clause 9 does not authorize a deduction of one-third from the cost of all repairs, as the court has done, but provides that the right to abandon shall not exist unless the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials, * * * should exceed half the amount insured. It is in making such an adjustment as of partial loss under the provisions of clause 8, that one-third is deducted from the cost of *certain*, not *all*, repairs. This we have already seen in the adjustment that was pre-

paired. For instance, one-third was not deducted from bottom calking, or bottom painting, or the entire cost of drydocking, or consumable stores. Those costs of repairs, and very important items they were, were treated under the provisions of clause 8 and the rules of adjustment, on entirely different principles than the deduction of one-third new for old. Under the general law, or codes, neither "thirds," nor any other deduction, would be made. *When, therefore, the District Court deducted one-third of the cost of all repairs, it was neither applying the clauses of the policies, nor the codes, or the general law.* In fact, it applied no principle pertinent to the case. It was clearly in error.

When the court took the average of the bids, *it was helpless to apply the provisions of clauses 9 and 8 and the rules of adjustment, because appellee made no proof of the various items making up the bids, other than the lowest, so as to permit the required segregation, in order that principles applicable to drydockage, consumable stores, bottom calking and bottom painting, could be utilized.* It found itself right where this court did in *Soelberg v. Western Assur. Co.,* supra, when it held that it was unnecessary to decide whether the amount of insurance of $15,000 in the one case, or $5000 in the other, or $75,000, the value of the ship mentioned in the policy, constituted the basis of the computation, *because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage.* The policy there was identical in form, so far as clauses 8 and 9 were concerned, with that in the case at bar. As there, so here, no evidence appears in this record to

give any basis whatever *for the use of the average of the bids* for the determination of the percentage of damage. Thus, it is established to a demonstration that the District Court, not only erred in the principle which it sought to apply, but also in its attempt to use an average of the bids. It did not, and could not apply the conditions of the policies; it applied no principles known to the general law, or the codes.

What the court meant by constructive abandonment, we are unable to determine from the opinion, unless it be abandomnent as for a constructive total loss.

Still further, the court erred in holding that Sec. 2705, of the California Civil Code, was applicable to this case. That section provides:

> "A constructive total loss is one which gives to a person insured a right to abandon under section 2717."

We respectfully submit that the section did not apply, *because the right to abandon was fixed by the conditions of the policies,* and not by Sec. 2717. And that the court attempted to so treat the case, is shown by its deductions of "thirds," whereas Sec. 2717 makes no allowance of "thirds," new for old. That section provides:

> "A person insured by a contract of marine insurance may abandon the thing insured. * * *
>
> 1. If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril;
>
> 2. If it is injured to such an extent as to reduce its value more than one-half;
>
> 3. If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed

> without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances. * * * ''

No mention of ''thirds'' in those sections! *When the court deducted one-third of the cost of repairs, it was not applying Sec. 2705 or 2717 of the code nor the provisions of clauses 8 and 9.*

Whatever was the dictum of the Supreme Court of California in

> *Victoria S. S. Co. v. Western Assur. Co.,* 139 Pac. 808,

it is inapplicable to the case at bar, because the right to abandon is controlled by the conditions of the policies and not by section 2705 or 2717. But even so, when the remarks of the California Court are read in the light of the question before that court, they will not be held to have destroyed the settled principles, established and upheld by all the courts, that an actual abandonment is essential to a constructive total loss.

> *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.,* supra;
>
> *Soelberg v. Western Assur. Co.,* supra.

The policy in suit in the California case, was a policy on freight. Sec. 2717 provided as to freight:

> ''4. If the thing insured, being cargo or freightage, the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. *But freightage cannot in any case be abandoned, unless the ship is also abandoned.''* (Italics ours.)

In that case, the ship was not owned by the same parties who held the freight policy. They had therefore no power of abandonment. By the strict terms of Sec. 2717, abandonment under the freight policy could not be made unless the ship was also abandoned. Thus, if both Sec. 2705, which provided that a constructive total loss is one which gives to a person insured a right to abandon under Sec. 2717, and Sec. 2717, which provided that freightage could not be abandoned unless the ship is also abandoned, should be given effect, in strict accordance with their terms, you could not have had a constructive total loss under the freight policy, because the assured there had no power to abandon the ship. All that the Supreme Court was deciding, then, was that, as respects a freight policy, it was not necessary under Sec. 2705, that there should be an actual abandonment. It was unfortunate that the court used such loose language, but we do not apprehend that this court will on that dicta upheave the settled principle that the right to abandon, and actual abandonment, are conditions precedent to the right to claim a constructive total loss.

The District Court has thus erred in many respects. Inasmuch as none of the evidence was taken before the court, and as this is an appeal in admiralty, we have no doubt but that the doctrine of a trial *de novo* will be applied to the case. The case is one of importance, and it would be a misfortune if the manifest errors, into which the District Court has regrettably fallen, should be permitted to stand as principles of law applicable to con-

tracts of marine insurance. We sincerely believe that they will be corrected by this court.

GENERAL AVERAGE SHOULD BE CREDITED ON ANY DECREE TAKEN AGAINST APPELLANT.

If perchance, this court should hold that appellee was entitled to recover under its policies as for a constructive total loss, there should be deducted from the total amount covered by the policies, the sum of $3,758.31, which appellant contributed to the general average on the adjustment drawn by Johnson and Higgins (Ap. 520). The total liability under the policies was $30,000. When, then, appellant paid $3,758.31 on account of the general average arising on the voyage, it was entitled to have that sum deducted from the $30,000, or liability in excess of the amount insured by the policy would thereby be created.

The District Court erred, therefore, in not allowing such credit.

SUMMARY.

We most respectfully submit:

1. That the "Nottingham" was unseaworthy, or at least that a conclusive presumption was raised by the evidence that she was unseaworthy, for the voyage, and that by reason thereof the policies in suit were voided.

2. That the marginal clauses did not override the provisions in the bodies of the policies, but that full force and effect can, and should be given to all of the clauses, terms and conditions of the policies, and that the con-

ditions of clauses 8 and 9, and the rules of adjustment, should be held to determine the right to abandon as for a constructive total loss.

3. That no valid verbal abandonment was ever given.

4. That the right to abandon as for a constructive total loss did not exist under the policies, because the amount which appellant would be liable to pay under an adjustment as of partial loss for the labor and materials necessary to the restoration of the "Nottingham" to her former condition, (exclusive of salvage or general average expenses and the cost of funds) would not have exceeded half the amount insured, to wit $15,000.

We respectfully submit, therefore that the District Court erred as assigned, and respectfully ask that the decree of the District Court may be reversed with instructions to dismiss, with costs and interest, the libel against appellant; and that in any event the decree be modified to allow said credit of $3,758.31, and interest; and that appellant may have such other and proper relief as this Honorable Court may deem meet and equitable.

Dated, San Francisco,
September 18, 1915.

Edward J. McCutchen,
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Proctors for Appellant.